No. 54, Original

In The Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF FLORIDA AND TEXAS, DEFENDANTS

REPORT OF SPECIAL MASTER ON MOTION OF DEFENDANTS FOR LEAVE TO FILE A COUNTERCLAIM

Olin Hatfield Chilson
Special Master
United States Courthouse
Denver, Colorado 80202

In The Supreme Court of the United States

No. 54, Original

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF FLORIDA AND TEXAS, DEFENDANTS

REPORT OF SPECIAL MASTER ON MOTION OF DEFENDANTS FOR LEAVE TO FILE A COUNTERCLAIM

BACKGROUND

By leave of Court, plaintiff filed its complaint alleging jurisdiction pursuant to Article III, Section 2, Clause 2 of the Constitution and stating in pertinent parts:

"II"

"Neither of the defendant States has or has ever had any right to control fishing by foreign vessels or their crews in the sea more than three geographical miles from the coastline of the United States.

"III"

"Each of the defendant States has asserted that it has the right to control fishing by foreign vessels and their crews in some part of the sea more than three geographical miles from the coastline of the United States, and in the exercise of that asserted right each of the defendant States has arrested foreign vessels and their crews for fishing in the sea at points more than three geographical miles from the coastline of the United States.

"IV"

"The exercise of control over fishing by foreign vessels and their crews in the sea more than three geographical miles from the coastline of the United States by the defendant States threatens to interfere with and cause irreparable harm to the foreign policy and conduct of the foreign relations of the United States.

"WHEREFORE, the United States requests that a decree be entered declaring that neither of the defendant States has any right to control fishing ~~for~~ by foreign vessels or their crews in the sea more than three geographical miles from the coastline of the United States."

Defendants filed their answers in May 1972. In its answer, Texas requested reference to a special master.

In June 1972, Honorable Charles L. Powell, Senior United States District Judge in Spokane, Washington, was appointed Special Master.

In July 1975, defendants filed a joint motion for leave to file a counterclaim which alleges jurisdiction under Article III of the Constitution and states in pertinent parts:

"II"

"Each of the Defendant States has asserted that it has the right to control fishing by foreign vessels and their crews in the sea within nine geographical miles seaward of their coastlines. The United States by its Complaint in this cause has denied the States' authority to control such fishing in the area more than three geographical miles seaward of their coastlines; the United States through discovery has denied the States' authority to control fishing by foreign vessels and their crews in the area within three miles seaward of their coastline.

"WHEREFORE, in order to avoid the strong probability of future, unnecessary litigation involving the authority of the States of Florida and Texas to control fishing by foreign vessels and their crews within three geographical miles seaward of their coastlines, the States of Florida and Texas request that a decree be entered declaring that the Defendant States have the right and authority to control fishing by foreign vessels or their crews in the sea within three geographical miles seaward of their coastlines."

In short, plaintiff seeks to adjudicate the defendants' rights to control fishing by foreign vessels and their crews beyond but not within three miles seaward from the coastline. By their counterclaim, defendants would enlarge the

litigation to adjudicate the defendants' rights to control fishing by foreign vessels and their crews within three miles seaward of their coastlines.

In the fall of 1975, Judge Powell died. The undersigned, on December 8, 1975, was appointed Special Master to succeed Judge Powell and the defendants' motion for leave to file a counterclaim was referred to him. The Special Master has considered the briefs and oral argument of the parties had on February 17, 1976, and makes this report.

SUMMARY OF DEFENDANTS' POSITIONS

The counterclaim would avoid a multiplicity of litigation. Defendants contend that it is plaintiff's official position that defendants have no right to control fishing by foreign vessels and their crews either within or beyond the three-mile limit, and that unless the defendants' rights within the three-mile limit are adjudicated in this action, future litigation is inevitable to determine the states' rights within the three-mile limit. Justice requires all issues be resolved in this litigation thereby avoiding the expense and other consequences of multiple litigation as well as uncertainty on the part of the defendants as to their rights to control fishing by foreign vessels and foreign crews within as well as beyond the three-mile limit.

Defendants assert that prior to this action the United States never questioned the right of the defendants to control fishing by foreign vessels and their crews within the three-mile limit, but since the institution of this action, plaintiff has denied defendants have such a right. The states are entitled to have their rights adjudicated not only with reference to the area beyond the three-mile limit but also within it.

Defendants further state that refusal to permit the adjudication of their rights to control fishing by foreign vessels and their crews within their three-mile limit will result in irreparable damage to the fishing industry in the defendant states as State participation in regulation and control of fishing by foreign vessels and crews is necessary for the proper

protection of the defendants' fishing industry.

Plaintiff opposes the motion asserting:

A. Sovereign immunity bars defendants' counterclaim.

B. The issue which defendants would raise by the counterclaim is not ripe for consideration.

SOVEREIGN IMMUNITY

The Special Master is of the opinion that the proposed counterclaim is barred by the sovereign immunity of the United States for the reasons which follow.

That the United States is not subject to suit by a state without its consent and that such consent can only be given by an act of congress, are doctrines well established by a long line of decisions of this Court. *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609, (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Minnesota v. United States*, 305 U.S. 382 (1939); *Ickes v. Fox*, 300 U.S. 82 (1937); *Arizona v. California*, 298 U.S. 558 (1936); *Kansas v. United States*, 204 U.S. 331 (1907).

This doctrine has been applied by this Court to cross claims and counterclaims as well as to original actions. *United States v. United States Fidelity & Guaranty Corp.*, 309 U.S. 506 (1940). *United States v. Shaw*, 309 U.S. 495 (1940); *Illinois Central Railroad Co. v. State Public Utilities Commission of Illinois*, 245 U.S. 493 (1918).

In their response brief filed October 30, 1975, defendants assert that to employ the doctrine of sovereign immunity in this case, "runs counter to any moral judgment"; "No logical or just, as opposed to dogmatic, justification exists- - -" for invoking sovereign immunity and that "- - - rationale for invoking sovereign immunity as a bar does not exist [in this case]." Defendants' Response Brief at 2, 3.

To support this argument, defendants cite the following cases.

National City Bank of New York v. Republic of China, 438 U.S. 356 (1955). This involved an action brought by the Republic of China, a foreign government, in the Courts of the

United States to recover $200,000.00 deposited in the National City Bank of New York. The Bank filed counterclaims seeking an affirmative judgment in excess of one million dollars. The Republic claimed immunity from the counterclaims as a foreign sovereign. This Court permitted the counterclaims to be made and denied the claim of sovereign immunity.

The opinion discusses a trend of waiver of immunity in certain areas by the legislative branches of government but there is no indication that the opinion repudiated or modified the doctrine of sovereign immunity recognized by previous decisions of this Court.

Defendants also refer to *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). This Court held that the action was in effect one against the United States, invoked the rule of sovereign immunity, and ordered the action dismissed.

After the *Larson* decision in 1949, this Court in *Dugan v. Rank*, 372 U.S. 609 (1963) and *Hawaii v. Gordon*, 373 U.S. 57 (1963), again applied the doctrine of sovereign immunity.

The defendants cite *United States v. The Thekla*, 266 U.S. 328 (1924) apparently as authority that the doctrine of sovereign immunity is not applicable to a counterclaim.

The Thekla involved the collision of two ships where libel and cross libel of the respective owners had been consolidated. The United States intervened and filed a claim alleging possession and ownership of the libelant's vessel at the time of the collision. Damages were decreed against the United States. The award was sustained by this Court.

In *United States v. Shaw*, 309 U.S. 495 (1940), *The Thekla* case was cited as authority that sovereign immunity did not protect the United States from a cross claim in a probate proceeding wherein the United States had filed a claim against the estate. This Court invoked sovereign immunity as to the cross claim against the United States stating:

"There is little indication in the facts or language

of *The Thekla* to indicate an intention to permit generally unlimited cross claims."

The Special Master finds the counterclaim is barred by the doctrine of sovereign immunity and recommends that the Court deny defendants' motion for leave to file the counterclaim.

RIPENESS

Whether or not the counterclaim is or is not "ripe" for determination is a mixed question of law and fact. The plaintiff asserts that there is no substantial likelihood that "- - - a controversy will develop - - -" over the question of the right to control fishing by foreign vessels and foreign crews within the three-mile limit. Defendants assert that unless the counterclaim is permitted, a future law suit by plaintiff to adjudicate this question is "- - - virtually inevitable."

If the Court denies defendants' motion for leave to file the counterclaim on the grounds of sovereign immunity, the question of "ripeness" of the controversy alleged in the counterclaim becomes irrelevant.

If, however, the Court determines the counterclaim is not barred by sovereign immunity, the question of whether or not a justiciable controversy ripe for adjudication has been alleged by the counterclaim will remain for consideration by the Special Master and ultimate determination by this Court. Additionally, the Special Master and the Court must determine a similar question with reference to the complaint. The defendants have interposed as a defense to plaintiff's complaint that it does not state a case or controversy ripe for determination. Answer of the State of Texas at 1; Defendants' Brief in Support of Motion for Leave to File Counterclaim at 9.

The determination of these questions may well involve a determination of factual issues from conflicting evidence. It is the opinion of the Special Master that to provide an expeditious and orderly procedure, in the event the motion for

leave to file the counterclaim is not denied on the ground of sovereign immunity, that the motion for leave to file the counterclaim be granted. Thereby the question of whether or not a justiciable controversy exists with respect to the matters set forth in both the complaint and the counterclaim can be litigated together with the other issues in the case in one unified proceeding. The Special Master so recommends.

Respectfully submitted,

Olin Hatfield Chilson
Special Master
United States Courthouse
Denver, Colorado 80202

March 4, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 54, ORIGINAL

* * *

UNITED STATES OF AMERICA,
Plaintiff

v.

STATES OF FLORIDA AND TEXAS,
Defendants

* * *

DEFENDANTS' EXCEPTION TO REPORT OF SPECIAL MASTER ON MOTION OF DEFENDANTS FOR LEAVE TO FILE A COUNTERCLAIM

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 54, ORIGINAL

* * *

UNITED STATES OF AMERICA,
Plaintiff

v.

STATES OF FLORIDA AND TEXAS,
Defendants

* * *

DEFENDANTS' EXCEPTION TO REPORT OF SPECIAL MASTER ON MOTION OF DEFENDANTS FOR LEAVE TO FILE A COUNTERCLAIM

* * *

The Report of the Special Master, Honorable Olin Hatfield Chilson, on Motion of Defendants for Leave to File a Counterclaim, was filed herein on April 19, 1976. The parties were allowed 45 days within which to file their exceptions, if any, thereto. The States of Florida and Texas, defendants herein, except to that portion of the Special Master's Report wherein it is recommended that leave to file a counterclaim be denied because of the sovereign immunity of the United States. The defendant States accept and urge approval of that portion of the Report wherein the Special Master finds that, apart from the issue of sovereign immunity, the issue raised in defendant's counterclaim should be litigated in one unified proceeding along with that raised by the United States' complaint.

EXCEPTION

THE SPECIAL MASTER ERRED IN RECOMMENDING THAT DEFENDANTS' COUNTERCLAIM BE BARRED BY THE SOVEREIGN IMMUNITY OF THE UNITED STATES.

STATEMENT

This lawsuit was commenced in March 1972 when the United States, by leave of Court, filed its complaint against the States of Florida and Texas, praying that this Court enter a decree declaring that neither of the defendant States has any right to control fishing by foreign vessels or their crews in the sea *more than* three geographical miles from their coasts.

In May 1972 the Defendants answered, denying that they lacked any authority over fishing by foreign nationals in the geographical area referred to in the United States' complaint. and affirmatively asserting that they possessed those rights within their recognized boundaries of three marine leagues (nine geographical miles) in the Gulf of Mexico.

In June and September of 1974, the United States, by answers to interrogatories and through deposition testimony of high Department of State officials, took the position that the defendant States lack any authority to control fishing by foreign vessels or their crews *at any point* seaward of their shorelines, not merely beyond three geographical miles therefrom. The United States thereby for the first time stated that it regards the issue of jurisdiction over fishing by foreign vessels as *one* subject matter as to all areas seaward of the coastline. It declared beyond any doubt its official position that the defendant States lack any authoirity to control such fishing at any point off their coastlines, and that it does

not distinguish between the States' authority within three geographical miles and more than three geographical miles from shore. Hence it became apparent that the United States' complaint deals with only a part of what it deems one unified subject matter over which the parties hereto strongly disagree.

Between September 1974 and January 1975, the defendants made every reasonable effort to remove the issue of their authority over fishing by foreign vessels and their crews within three geographical miles of their shores from this lawsuit by agreement among the parties.[1] Those efforts proving unsuccessful, in July 1975 defendants filed a joint Motion for Leave to File Counterclaim wherein they seek the following relief:

> WHEREFORE, in order to avoid the strong probability of future, unnecessary litigation involving the authority of the States of Florida and Texas to control fishing by foreign vessels and their crews within three geographical miles seaward of their shorelines, the States of Florida and Texas request that a decree be entered declaring that the Defendant States have the right and authority to control fishing by foreign vessels or their crews in the sea within three geographical miles seaward of their coastlines.

In September 1975 the United States filed its Opposition to Defendants' Motion for Leave to File Counterclaim, alleging that sovereign immunity bars

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[1]The manner in which the subject matter of defendants' counterclaim arose and their attempt to amicably remove it from this lawsuit are more fully set out in Defendants' Brief in Support of Motion for Leave to File Counterclaim and Appendices A and B thereto.

the filing of defendants' counterclaim and that the issue defendants seek to reaise is not ripe for adjudication.

On March 4, 1976 the Special Master, Honorable Olin Hatfield Chilson, made his Report on the Motion of Defendants for Leave to File Counterclaim. The Special Master recommends that this Court deny Defendants' Motion for Leave to File Counterclaim on the grounds that it is barred by the doctrine of sovereign immunity. He further recommends that, if the Court determines that the counterclaim is not barred by sovereign immunity, expeditious and orderly procedure would dictate that the motion be granted

EXCEPTION

THE SPECIAL MASTER ERRED IN RECOMMENDING THAT DEFENDANTS' COUNTERCLAIM BE BARRED BY THE SOVEREIGN IMMUNITY OF THE UNITED STATES.

SUMMARY OF ARGUMENT

In this case the United States seeks to invoke the doctrine of sovereign immunity in a factual situation that has never been passed upon by the Court. To bar defendants' counterclaim because of the United States' immunity would represent the most extreme extension of that doctrine imaginable. By their counterclaim, defendants merely seek to bring before the Court for adjudication one unified, integrated subject matter; to refuse leave to file defendants' counterclaim would prevent full justice from being done herein.

ARGUMENT

While opinions by this Court and inferior courts have stated that the United States is not subject to suit

without its consent, there has been very little judicial discussion of the reasons or principles behind the doctrine. *See, e.g., Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1939); *United States v. Lee*, 106 U.S. 196 (1882); *United States v. McLemore*, 4 How. 286 (U.S. 1846). Analysis of cases stating the doctrine reveals three rational, as opposed to dogmatic, justifications for the United States' immunity. Although interrelated and sometimes overlapping, the three rationales may be summarized as follows:

(1) The United States should not, without its consent, be required to expend public monies. *See, e.g., United States v. Shaw*, 309 U.S. 495 (1940); *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

(2) The United States should not be compelled judicially to deal with public property in a particular way. *See, e.g., Hawaii v. Gordon*, 373 U.S. 57 (1963); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); and

(3) To judicially dictate to the United States that it must or must not act in a certain way would intolerably interfere with public administration. *See, e.g., Hawaii v. Gordon, supra; Dugan v. Rank*, 372 U.S. 609 (1963).

In no reported case has the doctrine been invoked where, as here, the relief sought by the party opposing the United States would not even allegedly result in any of the results found objectionable in the cases referred to above. Defendants here seek merely to obtain a complete and full declaration of the respective rights of the parties to control foreign fishing off their shores. Not one cent of public money would be required to be spent by such a declaration. Defendants do not seek to dictate to the United States how to deal with any public

property, nor to enjoin it from any use or disposition of such property. Finally, and most significantly, defendants do not seek to compel or enjoin any act by the United States or any of its officials or employees. Not the slightest interference with public administration could result from the declaration defendants seek. Defendants do not ask for a declaration that they have exclusive enforcement rights within three miles from their coastlines. No contention is made that the United States should be excluded from enforcement activities within any area, or interfered with in the slightest way in its conduct thereof.

It is apparent that a judgment on the United States' complaint herein could adverssely affect the interests of the defendant States in the subject matter of their counterclaim, since the United States' position is that success on their complaint *ipso facto* denies the defendants' rights to enforce fishing laws against foreign vessels at any point off their coasts. Given this stated position of the United States, it would be unfair for it to avoid directly litigating herein the issue raised by defendants' counterclaim.

The rights of the defendant States with respect to fishing by foreign vessels off their coasts is one subject matter from the shore seaward to their recognized boundaries. This is demonstrated not only by the United States' position referred to above, but by physical practicalities. No signs or other landmarks divide the area within three miles of the shores of Texas and Florida in the Gulf of Mexico from the area seaward thereof. Adjudication of only the United States' complaint could result in a piecemeal declaration of rights that leaves the rights of defendants in hopeless confusion.

In the final analysis, the United States does not oppose the filing of defendants' counterclaim because of

any alleged danger that embarrassment, incumbrance, or expenditure could result therefrom. Rather, it opposes filing simply because it does not, for reasons thus far best known to itself, choose to reach the counterclaim's merits at this time and in this suit. Contrary to the absolutist position taken by the United States herein, sovereign immunity has not proved an utterly impenetrable barrier to decision on the merits in every case to which the United States has been a party. Where justice required, courts have refused to close their eyes to the facts and have allowed the adjudication of issues raised by parties in suits brought by the United States.

In *United States v. The Thekla*, 266 U.S. 328 (1924), a collision case in admiralty, the United States stood as libellant. A cross libel was filed, and the district court found in favor of the cross libellant for damages. The United States sought to escape liability, asserting its sovereign immunity. In language that transcends the case's admiralty setting, this Court, through Mr. Justice Holmes, wrote as follows:

> When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.
>
> The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest. . . *Id.* at 339-41

Recovery against the United States on the cross libel was allowed.

The Sepcial Master in his Report quotes from *United States v. Shaw, supra,* wherein this Court stated:

> There is little indication in the facts or language of *The Thekla* to indicate an intention to permit unlimited cross-claims. *Id.* at 503

Defendants do not here claim a right to "unlimited cross-claims" when the United States brings suit.[2] But where, as here, justice would be denied by a mechanical, uncritical application of the doctrine of sovereign immunity, and when no public interest would be subverted by a determination of a counterclaim, Mr. Justice Holmes' words forcefully apply. Under the unique facts of this case, the adjudication of defendants' counterclaim is essential if full justice is to be done.

Courts on the Circuit level have not viewed *The Thekla's* teaching as applying only to admiralty or collision cases. Fundamental fairness has prevented courts from allowing the United States to come into court as plaintiff and thereafter avoiding the just concerns of other parties. Those parties have been allowed their day in court over the United States' invocation of sovereign immunity. *See United States v. Martin,* 267 F.2d 764 (10th Cir. 1959)[United States not allowed to invoke sovereign immunity to bar counterclaim in water rights adjudication it initiated]; *Jacobs v. United States,* 239 F.2d 459 (4th Cir.), *cert. denied,* 353 U.S. 904, *rehearing denied,* 353 U.S. 952

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[2]The defendants are not herein launching a frontal assault on the doctrine of sovereign immunity. Their counterclaim herein may and should be allowed even though there may be legitimate areas for its continuing viability.

(1956) [United States may not invoke sovereign immunity to avoid making payments due on contract when its sues for return of contract documents]; *Lacy v. United States*, 216 F.2d 223 (5th Cir. 1954) [United States cannot prevent full adjudication of issues between the parties when it files injunction suit involving real estate.] *See also United States v. Briggs*, 514 F.2d 794, 808 (5th Cir. 1975) [United States cannot by sovereign immunity avoid suit to have plaintiffs' names expunged from grand jury report.]

The United States flatly denies that the defendant States have any right to control foreign fishing at any point of their coasts, viewing the issue of the parties' respective jurisdictions as one subject matter to which they contend the same rules of law apply. Defendants by their counterclaim merely attempt to bring before this Court the entire subject matter in controversy as acknowledged by the United States. Leave to file that counterclaim should not be denied because of the United States' arrogant assertion of the doctrine of sovereign immunity.

CONCLUSION

For the foregoing reasons, defendants, the States of Florida and Texas, pray that the Report of the Special Master on Motion of Defendants for Leave to File a Counterclaim be accepted insofar as the Special Master recommends that, except for the issue of United States' sovereign immunity, the issue raised by defendants' counterclaim should be litigated in one unified proceeding with those raised in the United States' claim. The defendants pray that leave of court to file their counterclaim not be denied by reason of the United States' sovereign immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lee C. Clyburn, Assistant Attorney General of the State of Texas, and a member of the Bar of the Supreme Court of the United States, do hereby certify that three conformed copies of the foregoing Exception to Report of Special Master on Motion of Defendants for Leave to File a Counterclaim were on the _____ day of June, 1976, forwarded to the Special Master, and to the Office of the Solicitor General of the United States, by placing conformed copies of same in the United States mail, first class mail, postage prepaid.

LEE C. CLYBURN

No. 54, Original

In the Supreme Court of the United States

October Term, 1976

United States of America, plaintiff

v.

States of Florida and Texas

RESPONSE OF THE UNITED STATES TO THE DEFENDANTS' EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 54, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF FLORIDA AND TEXAS

RESPONSE OF THE UNITED STATES TO THE DEFENDANTS' EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

This is a suit by the United States against the States of Florida and Texas for a declaration that they lack jurisdiction to enforce their fishery laws against foreign vessels and crews in the sea more than three geographical miles from the coastline of the United States in the Gulf of Mexico. The motion of the United States for leave to file the complaint in this case was granted on March 20, 1972, and the defendant States filed their answers claiming such jurisdiction on May 22, 1972. On June 26, 1972, this Court appointed a Special Master to conduct hearings and make recommended findings of fact and conclusions of law. The parties have been engaged in discovery since January 1973.

On July 14, 1975, the defendant States jointly moved for leave to file a counterclaim for a declaration that they have jurisdiction to enforce their fishery laws against foreign vessels and crews within three geographical miles of the coastline. The United States opposed the

motion by memorandum dated September 1975. On December 8, 1975, this Court referred the matter to Special Master Olin Hatfield Chilson,[1] who heard oral argument by the parties on February 17, 1976. On April 19, 1976, the Special Master filed his Report on Motion of Defendants for Leave to File a Counterclaim, concluding that the proposed counterclaim is barred by the sovereign immunity of the United States.[2]

As we elaborate below (pp. 4-8, *infra*), the Special Master's conclusion is correct. At the outset, however, we suggest another factor that militates against consideration of defendants' counterclaim in this case: whereas defendants are the only States whose interests appear to be implicated by the question presented for adjudication by the United States, resolution of the question defendants now seek to raise by counterclaim would affect the rights of all coastal States.

Defendants in their counterclaim seek adjudication of their rights in the territorial sea of the United States, *i.e.*, the belt of sea lying within three geographical miles of the coastline of the United States, whereas the complaint of the United States relates not to the territorial sea but rather to the contiguous zone that extends seaward therefrom. By the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, and the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331

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[1]Judge Chilson was appointed after the death of the Honorable Charles L. Powell, the Special Master originally appointed by the Court in this case.

[2]The Special Master also recommended that if this Court should disagree with his conclusion that sovereign immunity bars the counterclaim, then defendants' motion for leave to file the counterclaim should be granted notwithstanding the government's argument that the issue defendants seek to raise is not ripe for adjudication.

et seq., Congress granted the separate coastal States proprietary interests in the natural resources of the seabed and the navigable waters within the States' seaward boundaries, but retained for the United States the ownership of the natural resources of the Continental Shelf seaward therefrom. The boundaries of all coastal States other than Texas and Florida are coterminous with the three-mile territorial sea; the boundaries of Texas and Florida extend up to a distance of three marine leagues (approximately nine geographical miles) into the Gulf of Mexico. See *United States* v. *Louisiana*, 363 U.S. 1; *United States* v. *Florida*, 363 U.S. 121. See also *United States* v. *Maine*, 420 U.S. 515.

Thus, the defendants are the only States that may legitimately claim proprietary interests seaward of the territorial sea, and therefore are the only States that may attempt to assert a claim of jurisdiction over part of the contiguous zone on the basis of such interests. It was for this reason that the United States did not name other States as parties defendant in this case. But since all coastal States now possess interests in and jurisdiction over the submerged lands and natural resources of the three-mile territorial sea, each could assert a claim of jurisdiction similar to that which defendants seek to have adjudicated. Accordingly, defendants' counterclaim implicates the concerns of every coastal State. Consideration of that counterclaim on its merits would invite, at this late stage in the proceedings, participation by other coastal States as *amici curiae*, with the resultant expansion of this litigation that such participation would entail.[3]

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[3] *Douglas* v. *Seacoast Products, Inc.*, No. 75-1255, probable jurisdiction noted April 26, 1976, presents the question whether Virginia may lawfully prohibit American corporations that are owned

ARGUMENT

SOVEREIGN IMMUNITY BARS DEFENDANTS' PROPOSED COUNTERCLAIM

The Special Master correctly determined that defendants' proposed counterclaim is barred by the sovereign immunity of the United States. "It long has been established * * * that the United States, as sovereign, 'is immune from suit save as it consents to be sued' " (*United States* v. *Testan*, No. 74-753, decided March 2, 1976, slip op. 7, quoting from *United States* v. *Sherwood*, 312 U.S. 584, 586). See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Dugan* v. *Rank*, 372 U.S. 609. The rule is no different when the would-be plaintiff is a State. See, *e.g.*, *Kansas* v. *United States*, 204 U.S. 331; *Arizona* v. *California*, 298 U.S. 558, 568; *Minnesota* v. *United States*, 305 U.S. 382, 387; *Hawaii* v. *Gordon*, 373 U.S. 57, 58. And the rule applies to all suits against the sovereign, not simply to the types of actions listed by defendants (Exceptions, pp. 5-6). "[W]aiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States* v. *King*, 395 U.S. [1, 4]; *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). Thus, except as Congress has consented to a cause of action against the United States, 'there is not jurisdiction in * * * [any court] to entertain suits against the United States.' *United States* v. *Sherwood*, 312 U.S. at 587-588" (*United States* v. *Testan*, *supra*, at 7).

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by foreign interests from fishing in the territorial sea off Virginia's coast. The question defendants seek to raise here—whether the coastal states may regulate foreign vessels and crews in the territorial sea would be reached in that case, it would seem, only if an American flag vessel might somehow be deemed to lose its domestic status by virtue of the foreign ownership of the corporation to which it belongs.

The sovereign immunity to suit bars counterclaims as well as original complaints. *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512; *United States* v. *Shaw*, 309 U.S. 495, 503-505; *Illinois Central R.R. Co.* v. *Public Utilities Commission*, 245 U.S. 493, 504-505. Defendants argue that this rule may be abrogated "[w]here justice require[s]" (Exceptions, p. 7), citing *United States* v. *The Thekla*, 266 U.S. 328,[4] but the holding in that case—that when the United States libels a vessel for collision damages a cross-libel, determination of which is necessary to reach a conclusion

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[4]Defendants also rely upon *United States* v. *Martin*, 267 F. 2d 764 (C.A. 10), a decision relying uncritically on *United States* v. *The Thekla* without acknowledging that that case had been limited to its admiralty setting by *Shaw*. The other lower court decisions cited by defendants (Exceptions, pp. 8-9) are similarly unpersuasive. No counterclaim at all was asserted in *Lacy* v. *United States*, 216 F. 2d 223 (C.A. 5), where the court held that, as a condition precedent to a judgment requiring a landowner to remove certain property from an illegally-established government right of way, the United States would have to pay just compensation for the taking of the land involved. In *Jacobs* v. *United States*, 239 F. 2d 459 (C.A. 4), the court, distinguishing the entertainment of a counterclaim not authorized by Congress (which, the court recognized, *Shaw* forbids) from "conditioning the granting of equitable relief upon the doing of justice with respect to the subject matter of the relief granted" (*id.* at 462), held that it was proper to order the United States to pay the contract price as a condition of the decree awarding the government specific performance. Whatever may be said for the court's distinction, the case is inapposite here, where the United States does not seek equitable relief. In *United States* v. *Briggs*, 514 F. 2d 794 (C.A. 5), the court held that sovereign immunity did not bar unindicted coconspirators from moving, in a criminal proceeding initiated by the government, to have the references to them expunged from the indictment. The court of appeals there relied upon the fact that the judgment in that case ran against the clerk of the court, not against the United States; thus the decision has no relevance here. See 514 F. 2d at 808 and n. 25.

as to liability for the collision, may be filed—was expressly restricted to the special characteristics of claims for collisions in admiralty by the later decision in *United States* v. *Shaw, supra,* 309 U.S. at 502-504.

In *Shaw* this Court reaffirmed that sovereign immunity bars suit by way of counterclaim, notwithstanding the arguments made there by the respondent (309 U.S. at 501-502) that "when a sovereign voluntarily seeks the aid of the courts * * * it takes the form of a private suitor and thereby subjects itself to the full jurisdiction of the court" and that "the necessity for a complete examination into the [counterclaim]" and the "principle of a single adjudication" militate in favor of allowing counterclaims. In rejecting these arguments and refusing "to extend the waiver of sovereign immunity more broadly than has been directed by the Congress" (309 U.S. at 502), the Court adhered to the longstanding rule enunciated in *Nassau Smelting Works* v. *United States,* 266 U.S. 101, 106:

> The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it.

The only congressional authority allowing suit against the United States by way of counterclaim when sovereign immunity would bar an original action appears in 28 U.S.C. 2406,[5] allowing counterclaims "to the amount of the government's claim" (*United States* v. *Shaw, supra,*

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[5]Section 2406 provides, in pertinent part, that "[i]n an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he proves that such claim has been disallowed * * * by the General Accounting Office * * * ."

309 U.S. at 501). This limited waiver of the general rule that the United States does not, by initiating suit, consent to be sued on counterclaims has no application where, as here, the government's suit is not for money and the counterclaim is not a "claim for a credit." 28 U.S.C. 2406.[6]

No waiver of immunity from counterclaim appears in the Federal Rules of Civil Procedure. On the contrary, Rule 13(d) states that "[t]hese rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States * * * ."

In sum, defendant's argument (Exceptions, p. 8) that adjudication of their counterclaim is imperative lest "justice" be denied misses the point. The sole question is whether Congress has consented to the suit, and it is not for the courts "to tamper with these established principles [of sovereign immunity] because it might be thought that they should be responsive to a particular conception of enlightened governmental policy" (*United States* v. *Testan, supra,* at 8; see also *United States* v. *Shaw, supra,* 309 U.S. at 502). Since the United States has not consented to the suit that the defendant

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[6]Another possible exception to the general rule may be that when the government brings property into court it thereby consents to an adjudication of all rights therein. See Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 26, n. 84 (1963). This exception also does not apply here, for the United States is not seeking an adjudication of property rights in a particular *res* and, even if its suit could be so construed, the "property" involved, however it might be defined, would be "property" lying more than three miles seaward from the coastline, whereas the defendant States' counterclaim involves different "property" lying within three miles of the coastline.

States seek to bring against it by way of counterclaim, that suit is barred by sovereign immunity.

Moreover, contrary to defendants' claims, justice is not denied by this result. The question raised by the proposed counterclaim is in our view markedly different from that posed by the United States' complaint (see our Memorandum in Opposition to Defendants' Motion for Leave to File a Counterclaim, pp. 6-7). Thus, even if Rule 13, Fed. R. Civ. P., applied, defendants' counterclaim would not be compulsory, and there is no reason to grant defendants a privileged status, not enjoyed by any other coastal State, to sue the United States regarding the territorial sea simply because the United States has sued them regarding the contiguous zone.[7] Furthermore, if we are wrong and if, as defendants assert (Exceptions, p. 6), their rights "with respect to fishing by foreign vessels off their coasts is one subject matter from the shore seaward to their recognized boundaries," then determination of the United States' complaint will assure adjudication of all the relevant issues, and the filing of defendants' counterclaim is unnecessary.

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[7] Justice would not be denied by a denial of defendants' motion for the additional reason that the question they seek to raise is not ripe for adjudication (see our Memorandum in Opposition, *supra*, at pp. 6-7). The Special Master recommended that the issue of ripeness be litigated with the merits of the counterclaim if it is held not barred by sovereign immunity. Our position, however, is that the defendant States have not even alleged any facts sufficient, if true, to show a justiciable controversy. Thus the counterclaim fails *in limine* and we urge the Court to deny the motion for leave to file it for this reason as well as for reasons of sovereign immunity.

CONCLUSION

The defendant States' exceptions to the Report of the Special Master should be overruled and the motion for leave to file a counterclaim should be denied.

Respectfully submitted.

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